MOHD. ALWI MD. ZAIN

v.

KOO KIM CHAT

HIGH COURT MALAYA, KUALA LUMPUR
HARUN HASHIM J
[CIVIL APPEAL NO. 110 OF 1985]
22 NOVEMBER 1985

TORT: *Negligence - Liability - Determination of tortfeasor based on facts and evidence.*

CIVIL PROCEDURE: *Appeal - When appellate Court can disturb findings of fact of the trial Court.*

The plaintiff's case was that he was riding his motorcycle when the taxi driven by the defendant overtook him, cut into his path and stopped suddenly thereby causing an unavoidable collision. The defendant on the other hand said that he had stopped by the side of the road to disembark a passenger and the plaintiff in overtaking him from the left had collided into the open front door of the taxi. The learned President of the Sessions Court found in favour of the defendant and dismissed the plaintiff's claim on the basis that he found the plaintiff's version improbable because he could not reconcile between the plaintiffs's evidence that the defendant veered into the plaintiff's path and the fact of colliding into the door. He says if that had been the case the collision should have occurred with the rear of the taxi. The President also did not believe the plaintiff because in his police report he said that five of his teeth were broken whereas the medical report on his admission said his teeth were intact. The plaintiff now appeals.

Held:

[1] An appellate Court will be very slow in disturbing the findings of fact of the trial Court unless it appears from the record that the trial Court's findings of fact or inferences therefore are not supported by evidence.

[2] The first finding by the President ignored the fact that what cut into the path of the plaintiff was not the whole body of the taxi but only the open front door.

[3] The second finding of the President ignored the fact that in the plaintiff's statement of claim he had said that he had lost his upper partial denture carrying nine teeth and loss of lower right two molars and that the medical evidence supports this claim and further added that there was also a possibility of his losing his lower four incisors teeth as well and furthermore the examining doctor said "Teeth appear intact" not that teeth were intact. Even if the learned President found that the plaintiff "was trying to prove his claim", it does not follow that he was not a truthful witness as regards to how the accident occurred. On the balance of probabilities, the learned President ought not to have found that the plaintiff was to be blamed for the accident.

[4] The defendant was negligent in stopping his vehicle away from the curb so that vehicles could pass on his left and allowing the passenger to open the door without first ensuring that it was safe to do so. The defendant admitted that he did not look in the rear-view mirror before stopping and opening the door or was even aware that the plaintiff was behind him. The defendant is wholly to be blamed for this accident. Even if the defendant and the passenger are joint tortfeasors, the plaintiff is entitled to sue and recover wholly from the defendant.

[Appeal allowed.]

Case referred to:
Tan Hung Chiang v. Ang Kong Hwee [1965] MLJ 59

For the appellant/plaintiff - R.K. Nathan; M/s. R.K. Nathan & Co.
For the respondent/defendant - Prakash Menon; M/s. Lawrence, Dhillon & Associates

JUDGMENT

Harun Hashim J:

The plaintiff's case was that he was riding his motor-cycle when the taxi driven by the defendant overtook him, cut into his path and stopped suddenly thereby causing an unavoidable collision. The defendant on the other hand said that he had stopped by the side of the road to disembark a passenger and the plaintiff in overtaking him from the left had collided into the open front door of the taxi. The learned President of the Sessions Court found in favour of the defendant and dismissed the plaintiff's claim. Hence this appeal.

The learned President's decision is based on findings of facts. An appellate Court will be very slow in disturbing the findings of fact of the trial Court unless it appears from the record that the trial Court's findings of fact or inferences therefore are not supported by the evidence.

In the instant case, the undisputed evidence was that the taxi stopped to allow a passenger to alight and that the motor-cyclist collided with the open front near-side door of the taxi. According to the defendant he had pulled up about one foot from the raised curbside of the road. If that was so, it would have been almost impossible for the plaintiff to squeeze through. According to the plaintiff, however, he was about 1 ½ ft. to 2 ft. from the curb and the taxi was about 3 ft. to his right. That would have been enough space to go past the taxi. What caused the collision was the fact that the front-door was opened at the time the motor-cycle was passing the taxi. A more reasonable inference from the facts is that the defendant stopped his taxi some distance away from the curb and that he did so without adequate warning of his intention to do so. And as the collision occurred almost immediately after the door was opened, the defendant must have either overtaken the motor-cycle before stopping or stopped so suddenly without regard for vehicles following him. The learned President found the plaintiff's version improbable because he could not reconcile between plaintiff's evidence that the defendants veered into his path and the fact of colliding into the door. He says the collision should have occurred with the rear of the taxi. This finding ignores the fact that what cut into the path of the plaintiff was not the whole body of the taxi but the open door. The only reason the learned President gave for not believing the plaintiff was the fact that in his police report said that five of his teeth were broken whereas the medical report on his admission said his teeth were intact. But this ignores the fact that in his statement of claim he said he had lost his upper partial denture carrying nine teeth and loss of lower right two molars teeth. The medical evidence supports this claim and further added that there was also a possibility of his losing his lower four incisors teeth as well. His main injuries were a lacerated wound over centre of lower gum separating the jaw into two halves and the fracture of the mandible. He was bleeding in the mouth on admission to hospital and the examining doctor would only say: "Teeth appear intact" not that teeth were intact. Even if, as the learned President found that the plaintiff "was trying to improve his claim," it does not follow that he was not a truthful witness as regard as to how the accident occurred. On a balance of probabilities, the learned President ought not to have found that the plaintiff was to be blamed for the accident.

The only other issue was who was in fact the tortfeasor in this case, the taxi driver or the passenger or both. The defendant says, it was the passenger and relies on *Tan Hung Chiang v. Ang Kong Hwee* [1965] MLJ 59. In that case the plaintiff had put out his hand to signal that he was slowing down as the taxi next to him had stopped. The passenger opened the near-side door to alight and hit the plaintiff's forearm. It was held that the taxi-driver was not under a duty to third persons to see that his passenger did not commit an act of negligence in leaving the taxi. That case must be distinguished on the facts. There the taxi had given warning it was stopping. It stopped on the correct side of the road as it was a one-way street. The passenger clearly was negligent in opening the door when it was not safe to do so. In the instant case, the defendant was negligent in stopping his vehicle away from the curb so that vehicles could pass on his left and allowing the passenger to open the door without first ensuring that it was safe to do so. The defendant admitted that he did not look in the rear-view mirror before stopping and opening the door or was even aware that plaintiff was behind him. The defendant is wholly to be blamed for this accident. Even, if the defendant and the passenger are joint tortfeasors, the plaintiff is entitled to sue and recover wholly from the defendant.

In all the circumstances of this case, I held that *Tan Hung Chiang's* case does not apply to the facts of this case. For the reasons stated, I allowed the appeal. The learned President did not assess the damages. I proceeded to do so and awarded special damages of RM168 (agreed sum) and a global sum of RM10,000 general damages having taken into account the authorities and giving allowance for lapse of time the reported awards were made.

Also found at [1990] 1 CLJ 522